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IN THE

Supreme Court Of The United States

October Term, 1957

No. 623

O. J. OOSTERHOUDT,

Appellant,

v.

ROBERT M. MORGAN, et als.,
as and constituting the
FLORIDA STATE BOARD OF
ACCOUNTANCY,

Appellee.

JURISDICTIONAL STATEMENT.

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No.

O. J. OOSTERHOUDT,

Appellant,

v.

ROBERT M. MORGAN, et als.,
as and constituting the
FLORIDA STATE BOARD OF ACCOUNTANCY,

Appellees.

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Florida entered May 31, 1957, with petition for rehearing denied by order dated July 17, 1957, reversing a summary final decree of the Circuit Court for Alachua County, Florida, this appellant submitting this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

(a) OPINIONS BELOW

The opinion of the Supreme Court of Florida filed in this action May 31, 1957 (3a)* is reported only in Vol. 96, Southern Reporter, 2nd Series, at page 139. The summary final decree of the Circuit Court for Alachua County, Florida, dated June 7, 1956 (1a), is unreported.

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* Arabic numerals followed by letter "a" refer to pages of Appendix.

(b) JURISDICTION

The jurisdiction of the Court is invoked on the following grounds:

Nature of the Proceedings

(i) Being invited to become a resident partner, in Florida, of a national or inter-state firm of Certified Public Accountants, the plaintiff Oosterhoudt, appellant here, a practicing Florida CPA, made application to the Florida State Board of Accountancy, appellees here, for permission to become such resident partner and as such to continue the practice of accountancy in Florida. Appellee Board refused such permission holding that the Florida Accountancy Statute prohibited Oosterhoudt from acting as the resident partner of an inter-state accounting firm, unless all the partners, non-resident as well as resident, were licensed in Florida. Thereupon Oosterhoudt sued the State Board in the Circuit Court of Alachua County, Florida, for a declaratory decree. From a decree in favor of Oosterhoudt, the State Board appealed to the Supreme Court of Florida, which Court reversed, and, upon remand, the lower Court dismissed Oosterhoudt's complaint.

Dates of Judgment of Supreme Court of Florida and Order Denying Rehearing

(ii) The date of the judgment of the Supreme Court of Florida herein sought to be reviewed is May 31, 1957; petition for rehearing denied by order dated July 17, 1957. Notice of Appeal filed by appellant September 11, 1957, in the Supreme Court of Florida. Time for filing Transcript extended to Nov. 25 by Order dated Nov. 1, 1957.

Statutory Provision Believed to Confer on this Court Jurisdiction of this Appeal

(iii) Appellant believes that Tit. 28, USC, Sec. 1257 (2), confers jurisdiction of this appeal on this Court.

Cases Believed to Sustain Jurisdiction

(iv) Appellant believes that the following cases sustain the jurisdiction of this Court:

An unreasonable prohibition or restriction upon the practice of a profession or business is a violation of the due process and equal protection clauses of the 14th Amendment.

Schware v. Board of Bar Examiners, 353 U.S. 232; 77 S. Ct., 752, 1 L. Ed. 2d 796;

Konigsberg v. State Bar of California, 353 U.S. 252, 77 S. Ct., 722, 1 L. Ed. 2d. 810.

New State Ice Co. v. Liebmann, 285 U.S. 262, 52 S. Ct. 371, 76 L. Ed. 747.

Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 44 S. Ct. 412, 68 L. Ed. 813.

Also when such prohibtion or restriction is imposed by a State statute.

Wieman v. Updegraff, 344 U.S. 183, 73 S. Ct. 215, 97 L. Ed. 216.

City of New Brunswick v. Zimmerman (CA 3), 79 Fed. 2d. 428.

State Court decisions to the same general effect are, —

Frazier v. Shelton, 320 Ill. 253, 150 N.E. 696.

Campbell v. McIntyre, 165 Tenn. 47, 52 S.W. 2d. 162.

Moore v. Grillis, 205 Miss., 865, 39 So. 2d 505, 10 ALR 2d. 1425.

Florida Statute Involved

(v) The text of the particular provision of the Florida Accountancy Statute, held by the Florida Supreme Court to prohibit the appellant from practicing accountancy in the manner proposed, is Sec. 473.16, Fla. Statutes., which reads as follows:

> "473.16 *Unlawful for certificate holder to act as agent for non-resident accountant; exceptions.*
>
> "It is unlawful for any person holding a certificate as a certified public accountant or a certificate of authority as a public accountant to act as the representative, agent or manager, in the State of Florida, in connection with the practice of public accounting, of any person not authorized under the provisions of ~~any persons not authorized under the provisions~~ of this chapter to practice public accounting in this State, or of any firm or association of persons, unless each member of such firm or association of persons shall be authorized to practice public accounting in this state under the provisions of this chapter; provided, that any certified public accountant or firm of certified public accountants residing beyond the limits of the State of Florida, who was or were represented on June 25, 1931, in the State of Florida by a representative, agent or manager, shall be permitted to continue to be represented in this state by such representative, agent or manager but no new or successor representative, agent or manager in the State of Florida shall be appointed, employed or selected for such certified public accountant or firm of certified public accountants without the approval in writing of the board first being had and obtained."

Other provisions of the Florida Accountancy Statute (Chapter 473, Florida Statutes, "Public Accountants") are pertinent and are quoted in the Appendix (16a).

(c) QUESTIONS PRESENTED BY THE APPEAL

The Questions presented by the appeal are:

(i) Do the provisions of Chapter 473, Florida Statutes, particularly Sections 473.16 and 473.23(3), violate the Constitution of the United States and in particular Section 1 of the 14th Amendment, by prohibiting the appellant, a practicing Florida CPA, from practicing his profession in Florida as the resident partner of an inter-state CPA firm previously having no Florida office, the other partners of which firm, all residing and practicing outside of Florida, are qualified to practice in other States though not in Florida?

(ii) Does such statute deprive the plaintiff of due process, or equal protection, or does it abridge his privileges and immunities, under Sec. 1 of the 14th Amendment?

(iii) Does such statute constitute an unlawful burden upon inter-state commerce and an unlawful discrimination against those engaged in such commerce?

(d) STATEMENT OF THE CASE

The action below was brought to obtain a declaratory decree that the Plaintiff Oosterhoudt, appellant here, was permitted, or was not prohibited, by the Florida Accountancy Statute (16a), to practice accountancy in Florida in the manner proposed by him.

Appellant is a Florida CPA in active practice in the City of Jacksonville (Tr. 3).* The accounting firm of Peat, Marwick, Mitchell & Co., with offices in New York City and

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* References to the transcript are to pages of the typewritten transcript of record.

40 or more other principal cities of the United States, are in active practice and duly licensed as CPAs in the State of New York and in numerous other states, but not in Florida. Besides numerous small business concerns, the clients of said firm, include also many large national corporations and many State and Federal governmental agencies. (Tr. 3). In auditing the accounts of such larger clients, it is often necessary to employ as many as from 50 to 100 or more members of the firm's staff, collaborating under a centralized supervision and direction (Tr. 3).

Having no Florida office, Peat, Marwick, Mitchell & Co. invited appellant Oosterhoudt to become their resident partner in Florida, and as such partner to continue to practice as a Florida CPA and (to use the statutory phrases) to hold out to the public of Florida that said firm are duly qualified New York CPAs (Tr. 4), all accounting and auditing work by appellant's office in Jacksonville to be performed under appellant's supervision by persons licensed in Florida such as appellant would otherwise be permitted by law to employ as his assistants (Tr. 4).

Appellant inquired of the appellee State Board whether he would be permitted to enter upon the performance of the proposed partnership arrangement without violating Florida Law and without risking prosecution or the loss of his license (Tr. 5, 6). The State Board declined to approve performance of the proposed partnership agreement. (Tr. 6). Thereupon, appellant sued for a declaratory decree, alleging violation of appellant's rights under the 14th Amendment and praying the Court to declare that he was entitled to practice as resident partner in Florida of Peat, Marwick, Mitchell & Co., and to hold out to the public that said firm was qualified to practice public accounting under the laws of New York, also that the Court might enjoin the State Board from attempting to revoke his license for so acting. (Tr. 7).

Upon the filing of the State Board's answer, raising only points of law, appellant Oosterhoudt moved for Summary Final Decree (Tr. 13, 15), the State Board filing a like motion (Tr. 14).

The lower Court rendered Summary Final Decree in favor of Oosterhoudt, upholding his right to practice accountancy in the manner proposed (1a), the Court avoiding the Constitutional objection to the Statute by holding that the prohibition of Sec. 473.16 (supra p. 4) against acting as the "representative, agent or manager" of a non-resident firm did not prevent the appellant from acting as a "partner" of such firm under Sec. 473.23(3); the decree declaring that, –

> "2. Conducting his practice in the manner hereinabove set forth, the plaintiff O. J. Oosterhoudt is entitled under the proviso contained in Sec. 473.23, paragraph (3), Fla. Stats., to act in the State of Florida as resident partner of the said firm of New York Certified Public Accountants and to hold out to the public of Florida that said firm of Peat, Marwick, Mitchell & Co. are qualified to practice public accounting under the laws of the State of New York."

On appeal by the State Board of Accountancy to the Supreme Court of Florida, that Court reversed, holding by its opinion filed May 31, 1957, that Sec. 473.16 Florida Statutes, (ante p. 4), made it unlawful for a licensed Florida accountant to act as the resident *partner* of an accounting firm unless each member of such firm is licensed under Florida law to practice public accounting.

Appellant Oosterhoudt filed a petition (Tr. 62) for rehearing which the Florida Supreme Court denied (Tr. 66); and upon remand to the lower court for the entry of a decree not inconsistent with the opinion, the lower court dismissed the complaint with prejudice (Tr. 67).

This appeal is from the final judgment of the Florida Supreme Court pursuant to which the lower court entered such order of dismissal.

(e) THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Appellant contends that the Federal Questions presented by this appeal are substantial, upon the following grounds, –

(i) The effect of the statute as construed by the Florida Supreme Court is to prohibit appellant from engaging in the practice of accountancy as a member of a partnership if such partnership has any member who is not licensed in Florida even though residing and practicing entirely outside Florida. The effect of the statute is not merely to prohibit such practice *as* a CPA or *as* a Public Accountant. The effect is to prohibit the practice of accountancy at all as a member of a partnership unless each and every partner, non-resident as well as resident, is licensed in Florida.

This statute is not the permissive type of statute, which permits one, upon complying with statutory requirements, to hold himself out as certified under the statute.

Sec. 473.25 Florida Statutes provides, –

> "No person xxx may hold himself out to the public as being qualified to practice public accounting, or any branch thereof, in the State of Florida, unless such person shall be the holder of a certificate xxx then in force and effect under the provisions of this chapter".

See the sweeping and ~~all-inclusive~~ definition of the term "public accounting" in Sec. 473.02 (16a).

This statute does not permit one to practice as a non-certified accountant. Thus Sec. 473.29 as amended in 1957 provides, –

> "Nothing contained in §§ 473.12, 473.19, 473.21, and 473.26-473.28 shall be construed to apply to any book-

> keeper or public bookkeeper engaged in the occupation of bookkeeping as an employee or independent contractor contracting with one or more persons, organizations, or entities for the purpose of keeping books, making trial balances, and preparing financial statements, all as a part of bookkeeping services; provided that such trial balances or financial statements are issued without opinion or certificate over the signature of such person as "Bookkeeper" or "Public Bookkeeper."

But regardless of what he is permitted or required to call himself, he is absolutely forbidden to practice accountancy beyond the rendering of mere "bookkeeping services".

So, this statute is to be distinguished from the Alabama Statute involved in *Lehmann v. State Board of Public Accountancy*, 263 U. S. 394, 44 S. Ct. 128, 68 L. Ed. 354, which was a permissive type of statute merely imposing certain requirements upon those practitioners who chose, but were not compelled, to have a State certificate.

(ii) It is obviously impossible for any firm such as Peat, Marwick, Mitchell & Co. to comply. Sec. 473.19 (22a) permits granting certificates to certificate holders from other states; but they must all come to Florida and live and work here "as a full time employee of a CPA xxx for a period of *two years* xxx", 473.19(2). Two years' residence likewise is required of all applicants for examination. Sec. 473.08(3), (17a)

Therefore, appellant Oosterhoudt is deprived by this statute of his right to participate as a partner in an interstate accounting practice, unless fortunate enough to represent a firm who is in under the "grandfather clause". This is neither reasonable nor a necessary interference with appellant's freedom of contract and with the normal and harmless pursuit of his chosen profession.

In *Allgeyer v. Louisiana*, 165 U.S. 578, 579 (1897); 17 S. Ct. 427, 41 L. Ed. 832, this Court said of the word "liberty" in the Fourteenth Amendment:

> "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

New State Ice. Co. v. Liebmann, 285 U.S. 262, 278, 52 S. Ct. 371, 76 L. Ed. 747 –

> x x x
> "Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the 14th Amendment. Under that amendment, nothing is more clearly settled that that it is beyond the power of a state, 'under the guise of protecting the public, arbitrarily [to] interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 513, 44 S. Ct. 412, 68 L. Ed. 813 –

> "x x x But a state may not, under the guise of protecting the public, arbitrarily interfere with private business, or prohibit lawful occupations, or impose unreasonable and unnecessary restrictions upon them."

In a case involving an accountancy statute, the Mississippi Supreme Court said: —

> "The Supreme Court of the United States said: 'A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' 'Liggett Company v. Baldridge, 278 U.S. 105, 49 S. Ct. 57, 59, 73 L. Ed. 204. • • • As stated, supra, Section 8912 is an infringement on the right of accountants not certified, and others engaged in preparing income tax returns, to pursue their occupation gainfully; tends to establish a monopoly in Attorneys and Certified Public Accountants; and restricts the liberty of the people in respect to contract."
>
> *Moore v. Grillis* (Miss.) 39 So. 2d, 505, 509, 510, 511 10 A.C.L. 2d. 1425

(iii) It is the province of the judiciary to inquire whether the regulation has any reasonable relation to the lawful purpose of the statute.

> "Constitutional protection having been invoked, it is the duty of the Court to determine whether the challenged provision has reasonable relation to the protection of purchasers of bread against fraud" etc. per Butler, J.,
>
> *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 513, 44 S. Ct. 412, 68 L. Ed. 813.

> "The police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably", per Brandeis, J.,
>
> *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 415, 55 S. Ct. 486, 79 L. Ed. 949.

(iv) No such reasonable relation exists. Practicing in the manner proposed by appellant, appellant's clients would have the *full benefit* and protection afforded by appellant's experience, talent, skill, character and financial responsibility; and appellant, equally with every other Florida CPA, would be subject to and controlled by the law of Florida.

Appellant's subjection to the control and direction of his non-resident partners has been viewed with alarm by appellees in their arguments prior to this appeal. In order to make a living, every accountant must be employed by an employer. The employer has the right to control and direct, defining the extent of the job and of its details; and the public accountant must accept the employer's control, and follow the employer's directions, or he must decline or withdraw from the employment. Indeed, in a particular instance, he may conceivably be forced to decline or withdraw from a particular employment in order to avoid risking the loss of his certificate. Yet that would be equally true of an independent Florida CPA, whose employment by an out-of-state employer comes to him direct, as it would be of a Florida partner of an inter-state firm, whose employment comes to him through his own firm. In both such cases, and in every such case, all work in Florida would be done entirely by Florida accountants and would be equally subject to the supervision and jurisdiction of the State Board of Accountancy. Having non-resident partners who are not licensed in Florida seems to have no conceivable connection with the matter.

A Florida CPA report made for an out-of-state client may change form before it reaches its final form. For example, it may be combined with similar reports from other States to form a consolidated report national in scope. But that could happen to any Florida CPA report; it could happen to a Florida CPA report issued direct to an out-of-state client by an independent Florida CPA; it could happen to such a report for an out-of-state client delivered not direct to the

client, but to an independent out-of-state CPA correspondent. But in either, any and every such case, whatever use is made of the Florida report after it leaves Florida would seem to be beyond the jurisdiction of Florida and of no concern to Florida authorities. Prohibiting the Florida CPA from having non-resident partners who are not licensed in Florida would appear to have no connection with the matter.

(v) Accountancy is not a provincial profession. In an important degree it is inter-state. The Federal Wage & Hour Regulations recognize the inter-state character of the employment of accountants by public accounting firms, although accountants are usually exempt from the Wage & Hour Law, because they are professional men. Sec. 541.302(f), Explanatory Bulletin on New Regulations effective January 25, 1950 – Part 541, – Executive Administrative, Professional, etc. Employees; *Rausch v. Wolf & Co.* (a firm of CPAs) D. C. Ill. 1947, 13 Labor Cases #63,870.

> "The field of accountancy has become greatly enlarged and much more important than formerly. We now have income tax laws, estate and inheritance tax laws, legislation on the sale of securities – blue sky laws, social security legislation, and unemployment insurance with payroll taxes, bank legislation, real estate brokers' laws, unfair trade practice acts, besides all of the work done by accountants in the field of rate regulation, insurance practice, public utility rates, sale of securities, largely resting upon the reputation of the accountants who do the accounting, and many other aspects of the matter which make the whole subject of public accountancy a proper field for the exercise of the police power in the interest of the public welfare."
>
> *Wangerin v. Wisconsin State Board of Accountancy*, (Wis. 1936) 270 N.W. 57, 61.

(vi) The untenable theory of the Florida Statute is that every non-resident partner of a Florida practitioner, solely by reason of the partnership relation, is also a Florida practitioner. If a firm has a partner practicing in Florida, and a partner practicing in New York, it seems that the New York practitioner would be practicing in Florida, even though he has never set foot in Florida.

Just because of the fact that the New York practitioner may conceivably be civilly liable for an act of his Florida partner, it would not follow that the New York practitioner would also be guilty in Florida of a crime committed by his Florida partner in Florida.

If an individual attorney happens to be a member of the bar of this Honorable Court, and his partners are not, it would not follow that, because of the partnership relation, all the partners are thereby conducting practice in this Court.

Regulatory statutes, as is this, imposing penalties, are criminal statutes. Criminal statutes are personal.

> "That guilt is personal applies as well to partnership as to other relations, and no one can be punished criminally for the criminal acts of his partner, merely by reason of any partnership relation, and in the absence of personal participation therein."
>
> *Munoz v. State*, 99 So. 555, 2d hn. 87 Fla. 220.

> "One is not necessarily criminally liable for the criminal acts of his partners, although such criminal acts may be accomplished in the conducting of the partnership business."
>
> *Vostre v. State*, 195 So. 151, 2d hn., 142 Fla. 366.

"While it is true that a law firm is responsible to a client for the negligent or fradulent acts of its individual members when acting within the scope of their authority, and each member of the firm, irrespective of his personal participation in the transaction, as well as the law firm itself, is liable to a client for money collected in the course of the firm's business and misappropriated by a member of the firm, it has been held or recognized in a number of cases that one member of a law firm is not subject to disbarment or discipline because of the misconduct of his partner which occurred without his knowledge, consent, or participation."

Annotation, 157 A.L.R. 613.

(vii) A reference to the accountancy laws of 53 jurisdictions, including District of Columbia and 4 Territories, shows that the Florida statute is the most restrictive of them all. Such reference is tabulated in the Appendix at page 1a. It is based upon an examination of the accountancy statutes appearing in the Accountancy Law Reporter of Commerce Clearing House, a standard reference work published in loose-leaf binder form in co-operation with the American Institute of Accountants. The tabular reference is given here for what the Court may think it worth as bearing upon unreasonableness.

(f) INDEX TO APPENDIX, INCLUDING OPINIONS, ORDERS AND STATUTE APPENDED.

The following are appended hereto:

(i) Summary Final Decree of the Circuit Court of Alachua County, Florida, entered June 7, 1956.

(ii) Opinion of the Supreme Court of Florida filed May 31, 1957

(iii) Order of Supreme Court of Florida entered June 14, 1957 allowing until July 1, 1957 to file Petition for Rehearing.

(iv) Petition for Rehearing.

(v) Order entered July 17, 1957 Denying Petition for Rehearing.

(vi) Final Decree of Circuit Court of Alachua County, Florida, Dismissing Complaint.

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(vii) Florida Accountancy Statute Chapter 473 Florida Statutes

———o———

(viii) Tabular Reference to the Accountancy Statutes of 53 Jurisdictions, including District of Columbia and 4 Territories.

Respectfully submitted,

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Appendix

IN THE CIRCUIT COURT OF FLORIDA, EIGHTH JUDICIAL CIRCUIT, IN AND FOR ALACHUA COUNTY.

O. J. OOSTERHOUDT,

Plaintiff,

-v-

No. 8321

ROBERT M. MORGAN, et als.,
as and constituting the
STATE BOARD OF ACCOUNTANCY,

Defendants.

SUMMARY FINAL DECREE

This cause came on after due notice to be heard on motions filed respectively by the defendants and by the plaintiff for summary final decree and decree on pleadings; and the said motions were argued by counsel for the respective parties, and it appearing to the Court from the pleadings that there is no genuine issue as to any material fact and that the plaintiff is entitled to a decree as a matter of law; Thereupon it is FOUND, DECLARED, ORDERED, ADJUDGED AND DECREED as follows:

1. The plaintiff O. J. OOSTERHOUDT is a duly licensed Certified Public Accountant under the laws of Florida, and as such is engaged in active practice in this State; and proposes to associate himself as a partner with a firm of New York Certified Public Accountants known as Peat, Marwick, Mit-

chell & Co. and to hold out to the public that his non-resident partners in such firm are qualified to practice public accounting under the laws of the State of New York, but all such accounting work the plaintiff may do for said firm within the State of Florida will be performed by him personally or by Florida accountants under his direction.

2. Conducting his practice in the manner hereinabove set forth, the plaintiff O. J. OOSTERHOUDT is entitled under the proviso contained in Sec. 473.23, paragraph (3), Fla. Stats., to act in the State of Florida as resident partner of the said firm of New York Certified Public Accountants and to hold out to the public of Florida that said firm of Peat, Marwick, Mitchell & Co. are qualified to practice public accounting under the laws of the State of New York.

3. That the aforesaid motion of the plaintiff is granted and the aforesaid motion of the defendants is denied; and summary final decree on the pleadings is hereby entered in favor of the plaintiff and against the defendants.

DONE AND ORDERED this June 7, 1956.

JOHN A. H. MURPHREE
Circuit Judge.

IN THE SUPREME COURT OF FLORIDA JANUARY TERM, A. D. 1957 EN BANC

ROBERT M. MORGAN, et als.,
as and constituting the
STATE BOARD OF ACCOUNTANCY,

Appellants,

vs.

CASE NO. 28,491

O. J. OOSTERHOUDT,

Appellee.

Opinion filed May 31, 1957

An Appeal from the Circuit Court for Alachua County, John A. H. Murphree, Judge

Lazonby, Dell, Graham & Mills and J. Lewis Hall, for Appellants

McCarthy, Lane & Adams, for Appellee

ROBERTS, J.

The issue here is whether a Florida certified public accountant is authorized under the provisions of the Florida Public Accounting Act. Ch. 473, Fla. Stat. 1955, to act as the resident partner of a New York accounting firm, none of whose members is licensed to practice public accounting in Florida, and to hold out to the public that such firm is qualified to practice public accounting under the laws of the State of New York. The question arose in a suit for a declaratory decree filed by the plaintiff-appellee against the defendant-appellants, as members of the Florida State Board of Accountancy, and was answered by the Chancellor in the affirmative. The defendants have appealed.

The decision of the lower court was based on the proviso contained in Subsection (3) of Section 473.23 of the Florida Public Accounting Act. Section 478.23 lists fifteen specific actions that constitute a violation of the Act, including in subsection (3) thereof:

> "Any person: * * * (3) Who shall, when practicing as a member of a firm, announce either in writing or by printing, or represent verbally, that the firm is practicing as 'Certified Public Accountants', unless all members of the firm are holders of valid and unrevoked certificates as certified public accountants issued by the state board of accountancy of this state; provided, that any person holding a certificate in good standing as a certified public accountant or as a public accountant granted by the state board of accountancy of this state, when acting as a representative, partner or manager of an individual or firm, properly qualified to practice public accounting under the laws of a state, or states, other than Florida, may hold out to the public that such individual is or that such individuals are, so qualified; * * *".

It is contended on behalf of the defendant State Board of Accounting that the proviso in the above-quoted provision must be read and construed in the light of other provisions of the Act in pari materia therewith; and that, when so read, the proviso relied upon by the plaintiff can only refer to out-of-state firms that come under the "grandfather clause" of Section 473.16, Fla. Stat. 1955. This section, as well as Section 473.23, was enacted as a part of Ch. 15637, Acts of 1931, and reads as follows:

> "It is unlawful for any person holding a certificate as a certified public accountant * * * to act as the representative, agent or manager, in the State of Florida, in connection with the practice of public account-

ing, of any person not authorized under the provisions of this chapter to practice public accounting in this state, or of any firm or association of persons, unless each member of such firm or association of persons shall be authorized to practice public accounting in this state under the provisions of this chapter; provided, that any certified public accountant or firm of certified public accountants residing beyond the limits of the State of Florida, who was or were represented on June 25, 1931, in the State of Florida by a representative, agent or manager; shall be permitted to continue to be represented in this state by such representative, agent or manager, but no new or successor representative, agent or manager in the State of Florida shall be appointed, employed or selected for such certified public accountant or firm of certified public accountants without the approval in writing of the board first being had and obtained."

Also pertinent here are the provisions of Section 473.17, authorizing the registration of a firm name and the use of the designation "Certified Public Accountants" in connection therewith if every member is a certified public accountant; and Section 473.26, prohibiting a person from practicing accountancy as a member of a firm unless he is a licensed Florida accountant.

By Section 473.16, supra, the Legislature has in clear and unambiguous words made it unlawful for a licensed Florida accountant to act as the "representative, agent or manager" in this state of a non-resident accounting firm unless each member of the firm is licensed under Florida law to practice public accounting. The proviso, or "grandfather clause" of this section was added by the Legislature for the usual purpose, that is, to preserve an existing right or status and not to create a new right or status — in this case, to preserve for non-resident accounting firms having a "representative, agent

or manager" in this state at the time of the enactment the right to continue to have such representation, but prohibiting a "new or successor" appointment of a representative by the firm without the written approval of the State Board of Accountancy. See State Board of Accountancy v. Webb, Fla. 1951, 51 So. 2d 296, 300.

The purpose of Section 473.23(3), supra, is to declare specifically that which is merely implied by other provisions of the Act, that is that it is unlawful for a member of an accounting firm to represent that his firm is a firm of "Certified Public Accountants" unless all members are licensed Florida certified public accountants. And, in our opinion, the only logical and reasonable construction of the proviso of this section is that it is also of the "saving clause" type, enacted for the purpose of protecting the representative in this state—whether a partner, agent or manager—of a non-resident accounting firm in the exercise of the rights preserved for him and for the firm by the "grandfather clause" of Section 473.16, supra.

This must be so because the proviso of Section 473.23(3) applies to a licensed Florida accountant "when acting as a *representative, partner or manager*" of a non-resident firm (emphasis added) and authorizes such person to hold out to the public that such non-resident firm is qualified to practice public accounting under the laws of another state; but, as has been noted, under Section 473.16 a non-resident firm whose members are not licensed Florida accountants is prohibited from having a "representative, agent or manager" in this state unless the firm was so representated on June 25, 1931. It is therefore obvious that insofar as a resident "representative" or "manager" of a non-resident firm is concerned, the proviso of Section 473.23(3) could be applicable only to non-resident firms that were entitled to have such representation in this state under the "grandfather clause" of Section 473.16. And it is neither logical nor reasonable to infer

that by the proviso in question the Legislature intended to save the rights of non-resident firms and their representatives who come under the "grandfather clause" of Sec. 473.16 and, at the same time and almost in the same breath, to authorize non-resident firms to be represented in this state by a resident *partner* without regard to whether they were so represented at the time of the enactment. Such a dichotomy, if intended, should be clearly and expressly stated and not left to inference.

The use of the word "partner" in the proviso of Section 473.23(3) instead of the word "agent" used in Section 473.16 does not require a different conclusion, as here contended by the plaintiff-appellee. In Section 473.16 the statute was dealing with the "representatives, agents or managers" of accountants and accounting firms; in Section 473.23(3) the statute was dealing with the members of accounting firms. The difference in the wording of the provisos of these two sections was necessitated by the difference in their context and, in our opinion, does not have the further import here contended for by plaintiff-appellee.

It was, then, error to hold that the plaintiff-appellee was authorized by Sec. 473.23(3) to act as the resident partner of a New York accounting firm whose members are not licensed Florida accountants, and to hold out to the public that such firm is qualified to practice public accounting under the laws of the State of New York.

The plaintiff-appellee raises the point that to construe the statute as we have would be an unreasonable restraint on freedom of contract and unconstitutional, contending that "it is palpably unreasonable to say that appellee, a Florida CPA in good standing, may practice alone, or that he may practice as a member of a firm only if all firm members hold Florida certificates, but that he is barred from practice in Florida if he has a partner residing and practicing outside the State who does not hold a Florida certificate."

We do not think the statute prohibits a licensed Florida accountant from practicing public accounting in this state in his own name, even though he may have an interest in a non-resident firm of accountants; he is simply prohibited from practicing in this state *as a member of* such firm and from representing that such firm is practicing as "Certified Public Accountants" unless the members thereof are Florida CPA's. This does not appear to be unreasonable in view of the fact that the qualifications prescribed for certified public accountants and the administration of such Acts must necessarily vary from state to state. Accordingly, this contention cannot be sustained.

For the reasons stated, the decree appealed from is reversed and the cause remanded for the entry of a decree not inconsistent with the opinions herein expressed.

TERRELL, C. J., THOMAS, THORNAL and O'CONNELL, JJ., CONCUR

HOBSON and DREW, JJ., Not Participating

IN THE SUPREME COURT OF FLORIDA JUNE TERM, A. D. 1957

FRIDAY, JUNE 14, 1957

ROBERT M. MORGAN, et als.,
as and constituting the
STATE BOARD OF ACCOUNTANCY,

Appellants,

-vs-

O. J. OOSTERHOUDT,

Appellee.

On motion of attorneys for appellee it is ordered that appellee be and he is hereby allowed until July 1st 1957, to file petition for rehearing in the above cause.

A True Copy

TEST: GUYTE P. McCORD

Clerk Supreme Court.

IN THE SUPREME COURT OF FLORIDA

ROBERT M. MORGAN, et als.,
as and constituting the
STATE BOARD OF ACCOUNTANCY,

Appellants,

-vs- No. 28,491

O. J. OOSTERHOUDT,

Appellee.

PETITION FOR REHEARING AND TO MODIFY THE OPINION AND ORDER.

To the Honorable Justices of the Supreme Court of the State of Florida:

Petitioner, the appellee O. J. OOSTERHOUDT, presents this his petition for rehearing, or, in the alternative, to modify the opinion and order herein, respectfully requesting this Honorable Court to reconsider its said opinion and order filed herein May 31, 1957, which reverses and remands the cause for the entry of a decree "not inconsistent with the opinions herein expressed".

As grounds for rehearing, petitioner respectfully suggests the following:

1. The Court in arriving at its decision overlooked or failed to consider the following:

(a) So construed, the Statute is an unreasonable interference with and burden upon Inter-state Commerce;

(b) So construed and applied, the Statute is not designed to serve any public interest or public purpose, but serves solely and exclusively to create a monopoly in the private interest of a favored few, and is in conflict with the due process and the equal protection clauses of both the Federal and State Constitutions.

2. The decision seems to have resulted from the Court's misunderstanding of the facts in this cause in the following particulars:

(a) The record does not show that the administration of Statutes regulating the practice of public accountancy must necessarily vary from State to State; and, as a matter of fact, the administration of such acts from State to State does not vary substantially. See Commerce Clearing House Topical Law Reports, "Accountancy Law Reporter", a standard compilation and reference work.

3. As grounds for the alternative petition to modify, petitioner would show that:

(a) If the Chancellor erred in rendering summary judgment for the plaintiff, it does not follow that summary judgment should now be rendered for the opposite party. The state of this record, and the present stage of this proceeding, do not warrant the entry of summary judgment *against* the plaintiff-appellee. This cause should be remanded for further proceedings with leave to amend and to take testimony upon the following matters:

(i) Whether professional standards in the practice of accountancy are essen-

tially uniform or vary substantially from State to State;

(ii) whether or not and how and when, and to what extent, employment as an accountant by a national or an interstate client can constitute the practice of accountancy within the State of Florida, and to what extent such employment constitutes practice outside the State;

(iii) to what extent a Florida accountant may accept and perform work forwarded to him from an office outside the State;

(iv) whether or not a Florida accountant performing work forwarded to him by an out-of-State correspondent thereby necessarily becomes the "representative or agent" of such out-of-State correspondent;

(v) whether or not a duly certified and registered Florida accountant fully disclosing his identity on all occasions who practices in his own name and on his own professional responsibility, may make known the fact that he has partners who reside and practice entirely outside the State.

WHEREFORE, petitioner prays that a rehearing be granted and that thereupon the decision of the lower Court be affirmed, or, in the alternative, that the opinion and order of

May 31 herein be modified in the manner suggested above.

Dated this June 28, 1957.

McCARTHY, LANE & ADAMS

By EDW. McCARTHY

Petitioner's Attorneys

423 Atlantic National Bank Building
Jacksonville 2, Florida

I DO CERTIFY that on June 28, 1957, copies of the foregoing petition for rehearing and to modify the opinion and order have been furnished by mail to Messrs. Lazonby, Dell, Graham & Mills, Baird Office Building, Gainesville, Florida, and to J. Lewis Hall, Esq., 121½ East Jefferson Street, Tallahassee, Florida.

By EDW. McCARTHY

Attorney

IN THE SUPREME COURT OF FLORIDA JULY TERM. A. D. 1957

WEDNESDAY, JULY 17, A. D. 1957

ROBERT M. MORGAN, et als.,
as and constituting the
STATE BOARD OF ACCOUNTANCY,

Appellants

-vs-

O. J. OOSTERHOUDT,

Appellee

On consideration of the Petition for Rehearing filed by Counsel for Appellee,

IT IS ORDERED by the Court that the said petition be, and the same is hereby, denied.

A true copy,

TEST: GUYTE P. McCORD

Clerk Supreme Court

(THE MANDATE IN THIS CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT FOR ALACHUA COUNTY)

IN THE CIRCUIT COURT OF FLORIDA, EIGHTH JUDICIAL CIRCUIT IN AND FOR ALACHUA COUNTY.

O. J. OOSTERHOUDT,

Plaintiff,

vs.

ROBERT M. MORGAN, et als.,
as and constituting the
STATE BOARD OF ACCOUNTANCY,

Defendants.

FINAL DECREE

THIS CAUSE came on to be heard upon the Mandate from the Supreme Court of Florida filed herein, dated July 19, 1957, for the entry of a decree not inconsistent with the opinions expressed in the opinion of the Supreme Court of Florida filed May 31, 1957, and the Court being advised in the premises, it is thereupon,

CONSIDERED, ORDERED AND DECREED,

That the Complaint herein be and the same is hereby dismissed with prejudice and the Plaintiff, O. J. Oosterhoudt, shall take nothing by his suit.

ORDERED AND DECREED in Chambers at Gainesville, Alachua County, Florida, this 5th day of August, A. D. 1957.

JOHN A. H. MURPHREE /s/
Circuit Judge

FLORIDA ACCOUNTANCY STATUTE

473.01 DEFINITION OF TERMS USED IN CHAPTER.

"Wherever the term 'certified public accountant' is used in this chapter, it shall be deemed and construed to mean a person holding a certificate to practice as a certified public accountant issued under this chapter, or any law of the State of Florida heretofore in force and effect.

"Wherever the term 'public accountant' is used in this chapter, it shall be deemed and construed to mean a person holding a certificate of authority to practice as a public accountant issued under the provisions of this chapter or any law of the State of Florida.

"Wherever the term 'board' is used in this chapter, it shall be deemed and construed to mean the state board of accountancy created under this chapter, unless otherwise specified."

473.02 'PUBLIC ACCOUNTING' DEFINED.

"A person, either individually or as a member of a firm or an officer or employee of a corporation, shall be deemed to be engaged in practice of public accounting within the meaning and intent of this chapter:

"(1) Who hold himself out to the public in any manner as one who is skilled in the knowledge, science and practice of accounting and as qualified to render professional services as an accountant for compensation; or

"(2) Who maintains an office for the transaction of business as a public accountant, or who, except as an employee of a public accountant, practices accounting, as distinguished from bookkeeping for more than one employer; or

"(3) Who offers to receive clients to perform for compensation, or does perform upon behalf of clients for compensation, professional services that involve or require an audit or verification of financial transactions and accounting records; or

"(4) Who prepares, signs or certifies for clients, reports of audits, balance sheets and other financial, accounting and related schedules, exhibits, statements, or reports which are to be used for publication or for credit purposes, or are to be filed with a court or other tribunal or governmental agency, or used for any other purpose; or

"(5) Who in general, or as an incident to such work, renders professional assistance to clients for compensation in any or all matters relating to accounting procedure and the recording, presentation and certification of financial facts; or

"(6) Who prepares for another or signs any statement, schedule, audit, balance sheet or other document or paper reflecting, or purporting to reflect, the results of an audit or examination of the financial records or books of account of such person, which is used, or intended to be used, for the purpose of obtaining or soliciting any loan or credit."

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"473.08 QUALIFICATIONS OF APPLICANT FOR EXAMINATION; CERTIFICATES TO SUCCESSFUL EXAMINEES; STANDARDS.

"(1) Any person who is a citizen of the United States and a resident of the State of Florida, over the age of twenty-one years, of good moral character, and a graduate of a high school with a four years' course of study, or who has had an equivalent education, and who shall otherwise meet the qualifications specified in the rules of the board, shall be entitled

to take an examination for the purpose of determining whether or not such person shall be permitted to practice in this State as a certified public accountant, provided such person

"(a) is a graduate of at least a four-year accredited college or university course with a major in accounting, or

"(b) has had not less than three years' experience in the practice of public accounting, or

"(c) has been engaged in the occupation of keeping books of account concurrently for more than one individual or business in the State of Florida as his sole vocation for a continuous period of at least five years immediately preceding the date of his application to take such examination, and proof of compliance with this provision shall be established in such form as is prescribed by the rules of the state board of accountancy.

"(2) A person who qualifies to take said examination pursuant to provisions of paragraphs (a) of subsection (1) of this section, and who takes and passes said examination, shall not receive a certificate as a certified public accountant and shall not be permitted to practice public accounting in this State until he shall have completed one year of work in a registered accountant's office, or until he shall have successfully completed an additional accredited one year accounting course at an accredited college or university, and proof of compliance with the provisions of this paragraph shall be established in such form as is prescribed by the state board of accountancy.

"(3) For the purpose of this section, a resident of Florida is defined as one who has resided in this state for at least two years immediately preceding the filing of his application, and who is legally domiciled in the State of Florida.

"(4) The provisions of paragraphs (b) and (c) of subsection (1) of this section shall be effective for a period of five years following the date of enactment of this amendment, after which period no person other than a graduate of at least a four-year accredited college or university course with a major in accounting shall be considered as having fulfilled the educational requirements necessary to qualify for an examination for the purposes of determining whether such person shall be permitted to practice as a ceritfied public accountant, except that any person whose application for an examination shall have been approved by the state board of accountancy prior to the termination of said five year period shall be entitled to take such examination at any time or times during the period of five years immediately following the termination of the five year period first referred to in this paragraph.

"(5) The state board of accountancy shall have the authority to establish the standards for determining and shall determine:

"(a) what constitutes an education equivalent to that of a graduate of a high school with a four-year course of training;

"(b) what educational institutions offer a four-year accredited college or university course, and

"(c) what courses taken at such schools constitute a major in accounting, within the contemplation of this section. As amended Laws 1951, c. 26483, § 1."

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"473.14 TEMPORARY CERTIFICATE

"The board may, in its discretion, adopt rules and regulations providing for the issuance of temporary certificates

to persons for the purpose of enabling such persons to fulfill specific engagements or employments, the contracts for which were entered into beyond the limits of the State of Florida.

"No such temporary certificate shall be valid for more than ninety days after its issuance, and no certificate shall cover more than one engagement, and no such certificate shall be issued to any firm or copartnership unless all of the members thereof hold certificates as certified public accountants issued under the laws of another state or certificates as chartered accountants issued under the laws of a foreign country; and no such temporary certificate shall be issued to an individual unless he holds a certificate as a certified public accountant issued under the laws of another state or country, or a certificate as a chartered accountant issued under the laws of a foreign country. Each person applying for a temporary certificate shall pay to the board the sum of ten dollars, which shall be disposed of as other moneys are required to be disposed of under this chapter."

"473.15 COMMUNICATIONS BETWEEN ACCOUNTANT AND CLIENT PRIVILEGED

"All communications between certified public accountants and public accountants and the person for whom such certified public accountant or public accountant shall have made any audit or other investigation in a professional capacity, and all information obtained by certified public accountants and public accountants in their professional capacity concerning the business and affairs of clients shall be deemed privileged communications in all of the courts of this state, and no such certified public accountant or public accountant shall be permitted to testify with respect to any of said matters, except with the consent in writing of such client or his legal representative."

"473.16 UNLAWFUL FOR CERTIFICATE HOLDER TO ACT AS AGENT FOR NON-RESIDENT ACCOUNTANT: EXCEPTIONS

"It is unlawful for any person holding a certificate as a certified public accountant or a certificate of authority as a public accountant to act as the representative, agent or manager, in the State of Florida, in connection with the practice of public accounting, of any person not authorized under the provisions of this chapter to practice accounting in this State, or of any firm or association of persons, unless each member of such firm or association of persons shall be authorized to practice public accounting in this state under the provisions of this chapter; provided that any certified public accountant or firm of certified public accountants residing beyond the limits of the State of Florida, who was or were represented on June 25, 1931, in the State of Florida by a representative, agent or manager, shall be permitted to continue to be represented in this state by such representative, agent or manager, but no new or successor representative, agent or manager in the State of Florida shall be appointed, employed or selected for such certified public accountant or firm of certified public accountants without the approval in writing of the board first being had and obtained."

"473.17 USE OF 'CERTIFIED PUBLIC ACCOUNTANTS' AND 'PUBLIC ACCOUNTANTS' IN FIRM NAME

"Any firm, every member of which is a certified public accountant, after registering the firm name with the board, may use the designation 'Certified Public Accountants' in connection with the firm name.

"Any firm, every member and resident manager of which is either a certified public accountant or a public accountant,

after registering the firm name with the board, may use the designation 'public accountants' in connection with the firm name."

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"473.19 CERTIFICATES GRANTED TO HOLDERS FROM OTHER STATES

"The board may, in its discretion, issue a certificate as a certified public accountant to any applicant who holds a valid and unrevoked certificate as a certified public accountant issued by, or under the authority of, another state or political subdivision of the United States, or who holds a valid and unrevoked certificate as a chartered accountant issued by, or under the authority of, a foreign country; provided, the applicant has compiled with the provisions of this chapter and the rules of the board. The board shall not be required to issue any certificate under the provisions of this section unless:

"(1) The original certificate was secured as the result of an examination which in the judgment of the board was the equivalent of the standard established by it, and,

"(2) The applicant has been engaged in the practice of public accountancy in Florida as a full time employee of a certified public accountant, as defined in this chapter, for a period of two years, and is a resident, having resided continuously in the State of Florida for a period of two years, and,

"(3) The state or country issuing the original certificate grants similar privileges to persons holding certificates as certified public accountants issued under the laws of this state, and.

"(4) The board is otherwise fully satisfied as to the moral and technical fitness of the applicant. As amended Laws 1947, c. 24164, § 2."

"473.20 REVOCATION OF CERTIFICATE; GROUNDS; PROCEDURE

"Any certificate to practice as a certified public accountant or as a public accountant may be revoked and canelled or suspended for a definite period, not to exceed two years, when it shall appear to the board:

"(1) That such person has been guilty of an act described in § 473.23; or,

"(2) That such person has been convicted of a felony; or,

"(3) That the certificate was obtained by fraud or deceit; or,

"(4) That such person has been guilty of any fraudulent, wrongful or unlawful act while holding such certificate; or

"(5) That such person was guilty of a fraudulent, wrongful or unlawful act prior to the issuance of the certificate and of which the board did not have knowledge at the time of the issuance of the certificate; or

"(6) That any reason exists which would have justified the refusal of the certificate in the first instance; or

"(7) Because of the commission by the holder of a certificate of any act which renders him unfit to associate with the fair and honorable members of the accounting profession; or

"(8) That such person is an habitual drunkard."

• • •

"473.22. CARD, SIGN, ETC., AS EVIDENCE AGAINST ACCOUNTANT

"The display of a card, sign, advertisement or directory listing, or the issuance of a letterhead, bearing a person's name as a practictioner of public accounting, shall be prima facie evidence in any hearing or prosecution against such person that the person whose name is so carried thereon is responsible for the same and that he is announcing himself thereby to be engaged in the practice of public accounting. In any hearing or prosecution under this chapter, the proof of a single act prohibited by law shall be sufficient, without proving a general course of conduct."

"473.23 PENALTY FOR SPECIFIC VIOLATIONS

"Any person:

"(1) Who shall use any other term than certified public accountant or the abbreviation C.P.A. to indicate that he is a public accountant with a specially granted title; or

"(2) Who shall announce by printed or written statement that he holds any membership in any society, association or organization of professional public accountants, unless such society, association or organization has been officially recognized by the board; or

"(3) Who shall, when practicing as a member of a firm, announce either in writing or by printing, or represent verbally, that the firm is practicing as 'Certified Public Accountants', unless all member of the firm are holders of valid and unrevoked certificates as certified public accountants issued by the state board of accountancy of this state; provided that any person holding a certificate in good standing as a certified public accountant or as a public accountant granted by the state board of accountancy of this state, when

acting as a representative, partner or manager of an individual or firm, properly qualified to practice public accounting under the laws of a state, or states, other than Florida, may hold out to the public that such individual is or that such individuals are, so qualified; or

"(4) Who shall attempt to practice public accounting under an assumed name, or in the name of a corporation; or

"(5) Who shall, as a member of a firm, announce either in writing or by printing, or represent verbally, that the firm is practicing as 'Public Accountants', unless all members of the firm are holders of certificates of authority to practice as public accountants or certificates as certified public accountants within the meaning of this chapter; provided, that any person holding a certificate in good standing as a certified public accountant or as public accountant granted by the state board of accountancy of this state, when acting as a representative, partner or manager of an individual or firm, properly qualified to practice public accounting under the laws of a state or states, other than Florida, may hold out to the public that such individual is, or that such individuals are so qualified; or

"(6) Who shall, an an officer of a corporation, permit it to practice public accounting; or

"(7) Who holds himself out to the public as a certified public accountant, or who assumes to practice as a certified public accountant, unless he has received and holds a certificate as such from the board; or

"(8) Who holds himself out to the public as a public accountant or who assumes to practice as a public accountant unless he has received and holds a certificate of authority from the board; or

"(9) Who shall practice, or hold himself out as qualified to practice, as a certified public accountant or as a public accountant after his certifiate has been revoked, or during the time that his certificate is suspended; or

"(10) Who shall practice, as an individual or as a member of a firm, or who shall permit a firm of which he is a member to practice, as a certified public accountant or as a public accountant, unless a registration card has been duly secured for the current year in accordance with the provisions of this chapter.

"(11) Who shall sell, buy, give, or obtain an alleged certificate as a certified public accountant or certificate of authority or a registration card in any other manner than as provided for by this chapter; or

"(12) Who shall attempt to practice as a certified public accountant or as a public accountant under guise of a certificate not issued by the board, or under cover of a certificate obtained illegally or fraudulently; or

"(13) Who shall knowingly certify to any false or fraudulent report, certificate, exhibit, schedule or statement; or

"(14) Who shall attempt by any subterfuge to evade the provisions of this chapter while practicing public accounting; or

"(15) Who shall, as an individual or as a member of a firm or as an officer of a corporation, permit to be announced by printed or written statement, or shall represent verbally, that any report, certificate, exhibit, schedule or statement has been prepared by a certified public accountant or by a public accountant when the person who prepared the same was not such certified public accountant or public accountant, except when such person is the employee of a certified public

accountant or public accountant, or a firm of certified public accountants or public accountants;

"Shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars for each offense or imprisonment in the county jail for a period not exceeding six months."

"473.24 USE OF TITLES 'CERTIFIED PUBLIC ACCOUNTANT' AND 'PUBLIC ACCOUNTANT'; PENALTY

"Any person who shall receive from the board under this chapter, or who shall have heretofore received from the board, a certificate to practice as a certified public accountant, shall be styled and known as a 'certified public accountant', and no other person shall assume to use title or the abbreviation 'C.P.A.' or any other word, words, letters or figures to indicate that the person using the same is a certified public accountant.

"Any person who has heretofore received from the board a certificate of authority to practice as a public accountant shall be styled and known as a 'Public Accountant' and no other person, except a certified public accountant, shall assume to use such designation to indicate that such person is entitled to practice as a public accountant in this state.

"Any person holding a proper certificate of authority to practice as a public accountant in the State of Florida, and who is in good standing thereunder, and who holds a certificate as a certified public accountant issued by or under the authority of another state or political subdivision of the United States, may use the letters 'C.P.A.' after his name, provided he shows immediately after such letters that name of the state or political subdivision as aforesaid under whose authority such certificate was issued.

"Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine or not more than five hundred dollars or imprisonment in the county jail for not more than six months."

"473.25 PRACTICING WITHOUT CERTIFICATE UNLAWFUL; PENALTY

"No person may practice in this state as a certified public accountant or as a public accountant, nor hold himself out to the public as being qualified to practice public accounting, or any phase or branch thereof, in the State of Florida, unless such person shall be the holder of a certificate as a certified public accountant or as a public accountant then in full force and effect under the provisions of this chapter.

"Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than six months."

"473.26 EACH MEMBER OF FIRM MUST HAVE CERTIFICATE; MANAGEMENT OF OFFICE; PRACTICING UNDER AN ASSUMED NAME; PENALTY

"It shall be unlawful for any person to engage in the practice of public accounting in this state as a member of a firm unless he shall be the holder of a certificate as a public accountant or a certificate as a certified public accountant, issued by the board. It shall be unlawful for any office of a public accountant or certified public accountant in Florida to be managed by anyone other than a certified public accountant or public accountant, registered as such in Florida; provided, however, that if on May 1, 1947, any office of a

public accountant or certified public accountant was and continues to be managed by a person who is not a certified public accountant or public accountant registered as such in Florida, such person so managing said office shall be permitted to continue managing said office until May 1, 1950. No person shall practice public accounting in this state under an assumed name, and no certificate as a certified public accountant shall ever be granted to a corporation. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than five hundred dollars or by imprisonment in the county jail for not more than six months. As amended Laws 1947, c. 24164, § 4."

"423.27 OCCUPATIONAL LICENSES

"Any state, county, or municipal official charged with the duty of collecting occupational taxes and issuing occupational licenses shall not issue to any person an occupational license to practice accountancy unless said person so applying for an occupational license shall produce to said officials a registration card for the year in which application is made issued by the state board of accountancy showing that said applicant is the holder of a license to practice as a public accountant or as a certified public accountant under the provisions of the laws of this state. Added Laws 1947, c. 24164, § 5."

"473.29 EXCEPTIONS

"Nothing contained in §§ 478.12, 473.19, 473.21, and 473.26-473-28 shall be construed to apply to any bookkeeper or public bookkeeper engaged in the occupation of bookkeeping as an employee or independent contractor contracting with

one or more persons, organizations or entities for the purpose of keeping books, making trial balances, and preparing financial statements, all as a part of bookkeeping services; provided that such trial balances or financial statements are issued without opinion or certificate over the signature of such person as "Bookkeeper' or 'Public Bookkeeper'." (as amended 1957).

TABULAR REFERENCE TO THE ACCOUNTANCY LAWS OF 53 JURISDICTIONS, INCLUDING DISTRICT OF COLUMBIA AND 4 TERRITORIES.

(Taken from CCH "Accountancy Law Reporter")

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SUMMARY

In 24 States having Regulartory Laws:	
No prohibition against inter-state firms; no application to non-resident partners	3
Certification required of only those individuals who are practicing in the State	6
Certification required of at least one general partner in addition to those individuals practicing in State	8
Registration required of all partners, but non-resident certificate holders may register without examination	6
Florida: Every partner must be registered. No *non-resident* certificate holder ever registered with or or without examination	1
Total	24
Legislation is PERMISSIVE only in	29

These 24 States have Accountancy Laws of the REGULATORY (Mandatory) Type.

Provisions Relating to Firms Having Out-State Partners are Indicated.

Florida	Ch. 473, F. S. All inter-state firms absolutely prohibited not in under "grandfather clause". No non-resident certificate holder ever registered with or without examination.
California	Ch. 1353 Laws '45 (Business & Professional Code, Div. 3) Partnerships: Each partner must be C.P.A. of some State. One general partner, the resident manager and partners engaged in practice in California must be California C.P.As.
Colorado	Ch. 2, R.S. '53 Partnership may register if every member and resident manager is certified in some State; and resident partners and resident managers are certified in Colorado.
Connecticut	1955 Supp. to Gen. Stats. '49, Ch. 223, Secs. 229 et seq. Partnerships: one general partner, resident manager and all personally practicing in State must be Connecticut C.P.As.
Georgia	'33 Code, T.84, C.2, 99, 9902 Partnership – no statutory provision. Attorney General's Opinion says all members be registered; but law permits registration of non-resident C.P.As. without examination

Illinois	S.B. 374, '43 All members of partnership must be registered, but certificates may be issued to non-resident C.P.A's without examination in Illinois.
Iowa	Code '54, C. 116 No express provision as to partnerships; but certificate holders from other states may be registered without examination in Iowa.
Kentucky	R.S. 53, C. 325 Same partnership provision as California.
Louisiana	Tit. 37, C. 2, R.S. '50 All members must be registered; but non-resident C.P.A's may be registered without examination by reciprocity.
Maryland	Art. 75A, Code '51 All members must hold certificates; but reciprocal certificates may be issued to holders from other States who intend to establish office and to practice in Maryland.
Michigan	Comp. L. '48, Vol. 2, C. 238 as amended Non-resident firm may register as P.A. if all resident members and managers hold certificates.
Mississippi	'42 Code, C. 12 No application to non-resident partners.
Missouri	R.S. '49, C. 326 Only resident partners and managers required to be registered.

Nebraska	Bill 266, Laws '57 Same partnership provisions as California.
New Mexico	'53 Stats. Tit. 67, Art. 23 Only resident partners need be registered.
Oregon	R.S. '53, Tit. 52, Secs. 673.010-673.990 Same partnership provisions as California.
Tennessee	'55 Code, Tit. 62, Ch. 1 Each partner must have Tennessee license; but out-State partners holding certificate of other State may be licensed by reciprocity without examination.
Texas	C. 315, Laws '45 Partnerships: Same as California statute.
Virginia	'50 Code, Secs. 54-84 to 54-102 All partners must be registered; but non-resident partners holding certificates of other States may register without examination.
Washington	Rev. Code. Tit. 18, Ch. 18.04 Same partnership provisions as California.
Wisconsin	Ch. 135, Wis. Stats. Only resident partners and resident managers of partnerships are required to hold certificates.
Alaska	Comp. L., Secs. 35.2-1 to 35.2-12 Only resident partners need be licensed. If all partners non-residents, firm may be licensed if each partner C.P.A. of some State and Board finds they meet essentials which would qualify them to practice in Alaska.

Hawaii — Rev. L. '45, C. 144
No restrictions as to membership of firm.

Puerto Rico — Laws '45, No. 293
Same partnership provisions as California.

The PERMISSIVE type of Statute.

"It is important to note that the law does not purport to prevent or punish the practicing of accountancy without a license or certififate from the Board, but only the holding of oneself out to the public as possessing the certificate which it is authorized to issue under the provisions of the act, the practicing as a certified public accountant, and the using of the abbreviation 'C.P.A.', or similar letters of designation, to deceive the public into believing that the person so acting is a certified public accountant under the law, without first undergoing the examination by the state board of accountants, as required by said statute, and otherwise complying therewith. In other words, anyone is at liberty to practice as an accountant, notwithstanding this law, so long as he does not represent himself to be a certified public accountant, as defined thereby, or use the abbreviation 'C.P.A.', or similar letters or device, to indicate that he is a certified public accountant."

Berkowitz vs. Wilson, 118 N.Y.S. 2d. 875, quoting State vs. DeVerges (La.), 95 So. 805, 27 A.L.R. 1526.

Statutes of the permissive type seem to present no constitutional question that is related to the present case. *Berkowitz vs. Wilson*, supra. And with the exception of the statutes of New York, Pennsylvania and Kansas, such statutes would not serve as a guide to a standard of reasonableness.

These 29 States have Accountancy Laws of the PERMISSIVE TYPE.

Alabama	Tit. 46 C. 1, '40 Code
Arizona	1955 Code, Tit. 32, C. 6
Arkansas	'47 Stats. Tit. 71, C. 6
Delaware	Tit. 24, '53 Code
District of Columbia	Tit. 2, C. 9, D.C. Code '51
Idaho	'47 Code, Tit. 67, C. 29; Tit. 54, C. 3
Indiana	C. 175, Laws '21
Kansas	C. 1, '55 Supp. Gen. Stats. '49 Same partnership provisions as California
Maine	C. 80, R.S. '54 Any firm may hold out that a specified member is C.P.A.
Massachusetts	G.L. 32, C.13, Secs. 33-35; C. 112, Secs. 61-65, 87A-87E Any firm may represent that a specified person is C.P.A.
Minnesota	'53 Stats. C. 326
Montana	Rev. Codes '47
Nevada	R.S. '57 Secs. 628.010 et seq.
New Hampshire	R.S. 55 Ch. 309

New Jersey	R.S. '37, Tit. 45, C.2, Secs. 1-13
New York	Cons. L. C.16, Art 149 Every partner must be C.P.A. of some State and each partner practicing in New York must be New York C.P.A.
North Carolina	Gen. Stats. '43 C. 93, Secs. 1-13, C. 95, Secs. 105-41 Liberal reciprocity.
North Dakota	Rev. Code '43, C.43-02 as amended
Ohio	Rev. Code '53, Tit. 47, C.4701
Oklahoma	'51 Stats., Tit. 59, C.1 as amended
Pennsylvania	Acts '47, No. 140 as amended Same partnership provisions as California
Rhode Island	G. L. '38, C. 148 as amended
South Carolina	'52 Code, Vol. 5, Tit. 56, Secs. 1-26
South Dakota	'39 Code, Tit. 9, C. 9.01
Utah	'53 Code, Tit. 58, Secs. 58-2-1-52-2-4 Liberal Reciprocity
Vermont	Rev. '47, C. 296
West Virginia	Code '31, C.30, Arts. 1 and 9
Wyoming	Comp. Stats. '45, Secs. 37-201-37-210
Virgin Islands	Ordinance 5-8-42

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 623

O. J. OOSTERHOUDT, *Appellant*

v.

ROBERT M. MORGAN et al., as and constituting the FLORIDA STATE BOARD OF ACCOUNTANCY, *Appellees*

MOTION TO DISMISS

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MOTION TO DISMISS

Appellees in the above-entitled case move to dismiss this appeal, pursuant to the provisions of Rule 16 (b) of this Court, on the following grounds:

(1) This appeal does not present any substantial federal question;

(2) The federal questions sought to be reviewed were not expressly passed upon below; and

(3) The judgment of the Supreme Court of Florida rests on an adequate non-federal basis.

COUNTER-STATEMENT OF THE CASE

For the purposes of this motion, appellees believe that the Statement of the Case made by appellant is, in the main, substantially correct, inasmuch as the trial court entered a Summary Final Decree based on the

pleadings of record without the introduction of evidence and the Statement contains an abstract of the material parts of the pleadings of record below, with two exceptions, however:

(1) The summary of the appellant-plaintiff's complaint, appearing at page 6, should read:

> Thereafter appellant sued for a declaratory decree, alleging that the "*State Board of Accountancy, without authority of law*, has adopted as their policy the arbitrary rule" the effect of which is a violation of appellant's rights under the 14th Amendment (Tr. 6-7). (Emphasis supplied)

(2) The attempted summary of the opinion of the Supreme Court of Florida, appearing at page 7, is inaccurate, and reference is made to the full text of the opinion which is included at page 3a *et seq.* of the Appendix.

ARGUMENT

1. This Appeal Does Not Present Any Substantial Federal Question

In his statement of the questions presented by this appeal, appellant draws into question the constitutionality of the provisions of Chapter 473, Florida Statutes, particularly Sections 473.16 and 473.23(3), under Sec. 1 of the 14th Amendment. His first two questions present merely different aspects of this alleged repugnancy of the statute, and for purposes of this argument will be considered together. For this part of the argument it will be assumed that these questions were properly raised and passed on by the courts below, but

appellees do not concede the correctness of this assumption, as more fully hereinafter discussed.

Underlying appellant's entire contention with respect to alleged unconstitutionality is a basic erroneous premise which he has assumed. The Supreme Court of Florida, despite appellant's repeated contentions to the contrary, has not unqualifiedly denied him the right to practice his profession of accountancy in the State of Florida in the event that he elects to become a partner in the non-resident firm of Peat, Marwick, Mitchell & Co. The court affirmatively ruled that appellant is simply prohibited from practicing in that state *as a member* of such firm unless or until all the members thereof are Florida certificate holders.

> "We do not think the statute prohibits a licensed Florida accountant from practicing public accounting in this state in his own name even though he may have an interest in a non-resident firm of accountants; he is simply prohibited from practicing in this state *as a member of* such firm and from representing that such firm is practicing as 'Certified Public Accountants' unless the members thereof are Florida CPA's." (Excerpt from opinion below, Appendix 8a)

No right or privilege has been denied appellant to continue his practice of accountancy as a CPA in any other capacity than as a partner of a non-resident firm which he would represent or hold out to the public of Florida as practicing as "Certified Public Accountants". Accordingly, the authorities relied upon and cited by appellant dealing with the constitutional right to engage in a lawful private business unfettered by arbitrary state curtailment or regulation are clearly not germane to this appeal.

There can now be no question that a state may, in the proper exercise of its police power, prescribe certain standards and regulations controlling the practice of the profession of accountancy as one of the learned professions. *Lehmann* v. *State Board of Accountancy*, 263 U. S. 394; *Berkowitz* v. *Wilson*, (1952) 118 N.Y.S. 2d 261, affirmed (1954) 307 N. Y. 851; *Frazier* v. *Shelton*, 320 Ill. 253, 150 N. E. 696.

A residency requirement in such a state regulatory statute, such as the residence requirement of the Florida statute here in question (Sec. 473.08 (1) and (3), Appendix 17a, 18a), is not *per se* unconstitutional as an abridgement of privileges and immunities under Sec. 1 of the 14th Amendment. *Quong Ham Wah Co.* v. *Industrial Accident Co.*, 255 U. S. 445; *Douglas* v. *New York N. H. & H. R. Co.*, 279 U. S. 377; *Haavik* v. *Alaska Packers Assoc.*, 263 U. S. 510; *La Tourette* v. *McMaster*, 248 U. S. 465.

In *La Tourette* v. *McMaster, supra*, a two year residency requirement as a prerequisite to issuance of a license to insurance brokers in South Carolina was held not to violate the "privileges and immunities" clause of the Constitution. Without hesitation this Court pointed out the distinction between "resident" and "citizen" and declared that the residency requirement constituted no discrimination with respect to "citizenship". The statute was held to apply equally to all citizens, of other states as well as citizens of South Carolina, in that all such "citizens" must reside within the state for the required two years before qualifying for the insurance brokers license. The rationale of this residency requirement is plain and it reasonably relates to the protection of unwary citizens against, among other things, would-be unscrupulous insurance brokers.

Such protection is obviously better secured through residents who would be under the supervision and control of a governing commission. This reasoning applies with equal force to the practice of the profession of accountancy.

In *Haavik* v. *Alaska Packers Assoc., supra,* this Court upheld the validity of a tax on non-resident fishermen in Alaska waters, which did not apply to Alaska residents, stating at page 515 (263 U. S.):

> "* * * we find nothing in the Constitution which prohibits Congress from favoring those who have acquired a local residence and upon whose efforts the future development of the territory must largely depend."

for it is

> "* * * only when variations are arbitrary and without reasonable legal basis that an unconstitutional discrimination occurs. A long line of decisions has molded this judicial concept."
>
> *United States* v. *Burnison,* 339 U. S. 87 at page 95

With respect to the third and last question presented by appellant, assuming, *arguendo,* that the practice of accountancy in some degree partakes of an interstate character (although appellees believe that there exists a grave doubt as to the application of the interstate commerce clause to the practice of a learned profession such as law, medicine, or accountancy), nevertheless, state enactments in the exercise of the police power of the state are valid notwithstanding that such enactments or regulations may incidentally or indirectly affect commerce. *The Minnesota Rate Cases,* 230 U. S.

352; *Terminal Railroad Ass'n of St. Louis* v. *Brotherhood of Railroad Trainmen*, 318 U. S. 1.

In the *Minnesota Rate Cases, supra*, this Court, speaking through then Mr. Justice Hughes, stated at page 402:

> "Further, it is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people although interstate commerce may incidentally or indirectly be involved."

2. The Federal Questions Sought to be Reviewed Were Not Expressly Passed Upon Below

Appellant in his Jurisdictional Statement has not fully complied with the provisions of Rule 15 (d) of this Court. He does state (page 6) that the complaint in the trial court alleged "violation of appellant's rights under the 14th Amendment," but reference to his complaint (Tr. 7) shows that the violation charged was the arbitrary rule adopted by the defendant members of the Board of Accountancy "without authority of law". He further states that the trial court, by its Summary Final Decree in his favor (1a), construed the statute differently so as to avoid the Constitutional objection. No further reference to the raising of the federal questions, now presented, is made in the Statement with respect to the subsequent proceedings in the Supreme Court of Florida, unless reference is made to the opinion of that court, included in the Appendix (3a-8a), where at page 7a the court deals with his contention that to construe the statute other than as the trial court had construed it would be an unreasonable

restraint upon freedom of contract and unconstitutional.

As already stated, the complaint did not allege that the statute in question was repugnant to the Constitution but that it had been incorrectly construed and applied by the arbitrary rule adopted by the appellees-defendants (Tr. 7). This was the issue presented to the trial court. Appellant prevailed in the trial court. As appellee before the Supreme Court of Florida in urging affirmance he, of course, defended the construction of the statute adopted by the trial court, contending, as stated above, that any different construction would constitute an unreasonable restraint upon freedom of contract. When the Supreme Court of Florida construed the statute adversely to appellant, and reversed the trial court, the appellant's petition for rehearing (10a-13a) alleged that the *construction* and *application* of the statute adopted by the Supreme Court constituted an unreasonable interference and burden upon interstate commerce and was in conflict with the due process and equal protection clauses of the Constitution. He again did not attack the statute itself as repugnant and void but complained again only of the construction made of its provisions. The petition for rehearing was denied without any reference by the court to the alleged federal questions, the Supreme Court of Florida thus reaffirming its previously announced construction of the statute. Accordingly, the Jurisdictional Statement does not specify how the other federal questions, now alleged, were raised and whether they were passed upon by the Supreme Court of Florida, as required by Rule 15 (d).

As appellant now phrases the questions presented by his appeal, the Florida statute itself is attacked as

repugnant and void, nor the construction or application of it made by either the appellees or the court. As demonstrated by the record this contention was not made in either court below and is now made here for the first time. The federal questions as now presented by appellant were not passed upon below, and this Court is without jurisdiction to consider them. Review by this Court is limited to the specific federal questions which were properly raised in the state court. *Whitney* v. *California*, 274 U. S. 357, 362-3; *Dewey* v. *Des Moines*, 173 U. S. 193, 197-8; *Louisville etc. R. Co.* v. *Louisville*, 166 U. S. 709; *Wilson* v. *Cook*, 327 U. S. 474, 483-4; *Adler* v. *Board of Education*, 342 U. S. 485, 496; *State Farm Mutual Ins. Co.* v. *Duel*, 324 U. S. 154, 160-1.

3. The Judgment of the Supreme Court of Florida Rests on an Adequate Non-Federal Basis

The Supreme Court of Florida in this case was called upon to construe and apply an enactment of the legislature regulating the practice and admission to practice of Certified Public Accountants within that state. It has adopted an authoritative construction of this regulatory statute. This is clearly a declaration of state law within a field peculiarly within the police power of the state, as already more fully discussed herein. No federal question is involved in this determination and statement of the law of Florida. The judgment appealed from clearly rests on an adequate non-federal basis. This Court has consistently and correctly adhered to the principle that it will not review a state court judgment based upon an adequate and independent non-federal ground, even in cases where a federal question may be involved and perhaps not correctly decided. *Murdock* v. *Memphis*, 20

Wall. 590, 636; *Berea College* v. *Kentucky*, 211 U. S. 45, 53; *Fox Film Corp.* v. *Muller*, 296 U. S. 207.

CONCLUSION

We respectfully submit, therefore, that the appeal presents no substantial federal question; that the federal questions presented by the Jurisdictional Statement and sought to be reviewed were not expressly passed upon below; and the Judgment of the Supreme Court of Florida clearly rests on an adequate non-federal basis. This appeal should, accordingly, be dismissed.

Respectfully submitted,

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